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IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1967

No. 1413

LITTLE RIVER MARINE CONSTRUCTION CO., INC.,

Petitioner,

versus

ALBERT FLAKSA

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered February 8, 1968, reversing a final decree of the United States District Court, Southern District of Florida, defaulting Respondent for failure to prosecute, and abide by orders regulating pre-trial procedure and attendance.

OPINIONS BELOW

District Court: Opinion contained in Final Decree, Appendix B hereto, has not been reported.

Fifth Circuit: Opinion, Appendix A hereto, is reported at 389 F2d 885 (Adv. No. 4, April 29, 1968).

JURISDICTION

The judgment of the Court of Appeals was entered February 8, 1968. The jurisdiction of this court is invoked under 28 U. S. Code, § 1254 (1).

QUESTIONS PRESENTED

The question which arises, particularly in the light of the decision of this Court in **Link** v. **Wabash R. R. Co.** (1962) 370 U. S. 626, and related cases, is whether the Court of Appeals was entitled and correct to create and impose limiting conditions precedent, of disciplinary action against Respondent's attorney or other lesser sanctions, upon the authority and exercised sound judicial discretion of the District Court, and thereby reverse the Final Decree of the District Court defaulting Respondent for failure to prosecute and failure to abide by orders and rules regulating pre-trial proceedings.

STATEMENT

The Admiralty and Maritime jurisdiction of the District Court was invoked on February 5, 1964, by the Petitioner filing a Petition for exoneration from or limitation of liability as owner of the vessel "Ducky" in respect to a flash fire on September 24, 1963, as the vessel lay afloat on Little River, at Miami, Florida, 28 U.S. Code, § 1331(1); 46 U. S. Code, § 185; (R. 1-7).

Issue was joined with the filing of Respondent's Answer and Claim on March 2, 1964. (R. 23; 28).

July 10, 1964, order for Pre-trial Conference on October 19, 1964, and trial on November 23, 1964, was entered and furnished counsel, which also provided for discovery cut off date, meeting of counsel, and the filing of a pre-trial stipulation (R. 40-49).

Petitioner in attempting to secure answers to interrogatories and thereafter items ordered produced by the court, drew attention to the pending order for pre-trial (R. 144).

Respondent had not prepared his case, had initiated no discovery, was not prepared to comply with the pre-trial order, and on October 12, 1964, served a petition to continue the pre-trial conference. The continuance was denied. (R. 145).

On October 28, 1964, counsel were advised to appear before the Court on October 30, 1964 (R. 145; 148). At this hearing the Court conducted an inquiry concerning the absence of a pre-trial stipulation on the pre-trial conference date of October 19, 1964. (R. 147-156). The attorney for Respondent in charge of and familiar with Respondent's case, though aware of the Court's instruction to appear before the Court on October 30, 1964, proceeded to a State Bar meeting and did not appear (R. 154).

The District Court on November 18, 1964, entered a Final Decree striking Respondent's Answer, dismissing Respondent's claim with prejudice, and entered judgment of exoneration in favor of Petitioner, for failure to prosecute with reasonable diligence and failure to abide by

orders and rules of the Court regulating pre-trial procedure (R. 146).

Respondent's Petition for Rehearing was denied after hearing (R. 196-197).

The Respondent appealed to the Court of Appeals for the Fifth Circuit (R. 197). That Court held dismissals with prejudice, absent personal participation of the litigant in the fault, improper without first imposing lesser sanctions and reversed the District Court's final decree (Appendix A; R. 204-213).

REASONS FOR GRANTING THE WRIT

I.

The decision of the Fifth Circuit is in conflict with this Court's decision in **Link v. Wabash R. R. Co.** (1962) 370 U. S. 262, in rendering an authorized dismissal with prejudice in the sound exercise of judicial discretion by District Courts, subject to mandatory, artificial, conditions precedent of "disciplinary action against the erring attorney" or other lesser sanctions "where the facts are not such as to indicate that the litigant is a participant in the fault".

II.

The decision of the Fifth Circuit, and other recent decisions of that Court, are believed in conflict with the decisions:

of the First Circuit in **Kelly v. U. S.** (1964) 338 F2nd 329; which expressly declined the alternative adopted by the Court of Appeals in this case;

of the Second Circuit in **Diapulse Corp. of Amer. v. Curtis Publishing Co.** (1967) 374 F2d 442; **Jones v. Uris Sales Corp.** (1967) 373 F2d 644; **West v. Gilbert** (1966) 361 F2d 314; **Deep South Oil Company of Texas v. Metropolitan Life Ins. Co.** (1962) 310 F2d 933; **Joseph v. Norton Company** (1959) 273 F2d 65;

of the Third Circuit in **Payne v. S. S. Nabob** (1962) 302 F2d 803;

of the Seventh Circuit in **Estava v. The House of Seagram, Inc.** (1963) 314 F2d 829; **Link v. Wabash R. R. Co.** (1961) 291 F2d 542, affirmed (1962) 270 U.S. 626; **Jameson v. DuComb** (1960) 275 F2d 293;

of the Eighth Circuit in **Janousek v. French** (1961) 287 F2d 616;

of the Ninth Circuit in **Fitzsimmons v. Gilpin** (1966) 368 F2d 561; **Agnew v. Moody** (1964) 330 F2d 871; **United States v. Pacific Fruit & Produce Co.** (1943) 138 F2d 367; **Hicks v. Bekins Moving & Storage Co.** (1940) 115 F2d 406; and

of the Tenth Circuit in **Sweeney v. Anderson** (1942) 129 F2d 756.

The authority and exercise of sound judicial discretion on the part of District Courts in dismissing with

prejudice has been sustained uniformly without conditions precedent of personal fault of litigant, or prior imposition of disciplinary action against the attorney or other lesser sanctions against the attorney or party.

CONCLUSION

Contrary to this Court's Link decision, and contrary to the authority and exercise of sound judicial discretion of District Courts as understood and administered in other Circuits; the decision below is clearly erroneous. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX A

[NUMBER AND TITLE OMITTED]

Appeal from the United States District Court for the Southern District of Florida.

(February 8, 1968.)

Before BROWN, Chief Judge, JONES, Circuit Judge, and BREWSTER, District Judge.

BREWSTER, District Judge: This admiralty proceeding was begun by appellee's petition for exoneration from or limitation of liability for damages resulting from a flash fire on a self-propelled barge owned by it. The appellant filed an answer to the petition and a claim for damages for alleged serious personal injuries growing out of the incident. Eight months after issue was joined, the trial court *sua sponte* entered an order striking the appellant's answer to the petition, dismissing his claim with prejudice, and decreeing that appellee was not responsible for the fire or liable for any damages resulting from it. The basis for the order was that appellant's proctor had "failed to abide by the orders and rules of this Court regulating pre-trial procedure applicable to this case in numerous respects", and that the sum total of his conduct amounted to a failure to prosecute his claim with reasonable diligence. A motion by appellant for rehearing under Rule 60(b), F.R.Civ.P. was overruled. The case is now before us on the sole question of whether the order was too drastic under the circumstances.

The order in question was entered after the appellant's proctor having the responsibility for trying the case failed to appear at a pre-trial conference. There was a background of that proctor's dereliction and failure to meet his responsibilities at every stage of the proceeding from the time issue was joined. The poorly prepared partner appellant's proctor sent to the pre-trial conference to act as his substitute put it mildly when he said at the beginning of the hearing: "Judge, I am not going to tax your patience with excuses. I think that our office has been derelict in its duty to the Court and I want you to accept my apologies. Although it is a sincere apology, I doubt if it is much comfort to you in a situation like this. I can't think of a worse time to come before the Court without a pre-trial stipulation which was following up the proceedings before." In spite of the fact that notice of the pre-trial conference was given only one hundred days before the date it was to be held, appellant's proctor completely ignored all provisions of the order relating to the preliminary work of counsel so necessary to make pre-trial effective. He came to the pre-trial conference totally unprepared, with nothing to offer except a motion for continuance. Even though the motion had no merit, the Court granted a few days additional time with instructions that the pre-trial conference would be called at the first opportunity on short notice. Appellant's proctor did nothing more during the following eleven days of grace. After he received notice of the new date for the pre-trial conference, he decided it was more important for him to go to a meeting in another city, and sent to the conference another member of the firm who had never heard of the case until the afternoon before the hearing. The proctor for the appellee had made ar-

rangements to attend the same meeting, but cancelled his plans in order to be present at the pre-trial proceeding.

As is true in most cases of dereliction of counsel, appellant's proctor had his excuses. The real meaning of most of them was that he just had something he thought was more important every time he had a responsibility to meet during the discovery and pretrial preparation stages of this case. His trouble was that he was doing too much judging and too little advocating. He always made the decisions on the validity of his excuses expecting the judge to manage his docket accordingly.[1] There is, however, nothing whatever in the record to indicate that the appellant had any knowledge of, or participation in, any of the derelictions of his counsel.

It is well established that the district court has the authority to dismiss or to enter default judgment, depending on which party is at fault, for failure to prosecute with reasonable diligence or to comply with its orders or rules of procedure.[2] While the authority is re-iterated in

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[1] "... With knowledge of the time and place of the pretrial hearing, plaintiff's counsel chose to complete his out-of-court work and called the district court and so advised it. In our opinion, this falls short of being a legitimate excuse for failing to appear in court at the time fixed." Link v. Wabash R. Co., 7 Cir., 291 F. 2d 542, 544 (1961), affirmed 270 U.S. 626, 82 S.Ct. 1386, 8 L. ed. 2d 734 (1962).

"Counsel for litigants, no matter how 'important' their cases are, cannot themselves decide when they wish to appear, or when they will file papers required in a law suit. Chaos would result..." Smith v. Stone, 9 Cir., 308 F. 2d 15, 18 (1962), quoted with approval in Nasser v. Isthmian Lines, 2 Cir., 331 F. 2d 124, 128 (1964).

[2] Link v. Wabash R. Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L. ed. 2d 734 (1962), affirming 7 Cir., 291 F. 2d 542; United States v. Proctor & Gamble Co., 356 U. S. 677, 78 S.Ct. 983, 2 L. ed. 2d 1077 (1958); Marshall v. Southern Farm Bureau Casualty Co., D.C.La., 36 F.R.D. 186, affirmed, 5 Cir., 353 F. 2d 737 (1966), cert. den. 384 U.S. 910; Durgin v. Graham, 5 Cir., 372 F. 2d 130 (1967); Deep South Oil Co. of Texas v. Metropolitan Life Ins. Co., 2 Cir., 310 F. 2d 933 (1962); Demeulenaere v. Rockwell Mfg. Co., 2 Cir., 312 F. 2d 209 (1962); Trans World Airlines, Inc. v.

some of the Federal Rules of Civil Procedure for particular situations, the power is one inherent in the courts "in the interest of the orderly administration of justice."[3] It may be exercised *sua sponte* under proper circumstances.[4] The exercise of the authority is discretionary, and is subject to review for abuse of discretion.[5] Dismissal of an action with prejudice and entry of judgment by default are drastic remedies which should be used only in extreme situations,[6] as the court has a wide range of lesser sanc-

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Hughes, 2 Cir., 332 F. 2d 602 (1964); West v. Gilbert, 2 Cir., 361 F. 2d 314 (1966); Diapulse Corp. of America v. Curtis Pub. Co., 2 Cir., 374 F. 2d 442 (1967); O'Brien v. Sinatra, 8 Cir., 315 F.2d 637 (1963); Montgomery v. C.I.R., 9 Cir., 367 F. 2d 917 (1966); Fitzsimmons v. Gilpin, 9 Cir., 368 F. 2d 561 (1966); Meeker v. Rizley, 10 Cir., 324 F. 2d 269 (1963). Annotation: *Dismissal of Action for Failure or Refusal of Plaintiff to Obey Court Order*, 4 A.L.R. 2d 348. 5 Moore, Federal Practice, 2d ed., p. 1041.

[3]"... It is sheer sophistry to argue that the trial court has no inherent power to enforce its rules, orders or procedures, and to impose appropriate sanctions for failure to comply. The authorities are all to the contrary." Link v. Wabash R. Co., 7 Cir., supra, note 1, at p. 545 of 291 F. 2d.

"The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered as an 'inherent power', governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases..." Link v. Wabash R. Co., supra note 1, at p. 630 of 370 U.S.

"Moreover the dismissal was within the inherent power of the court to enforce its orders and manage its affairs." Marshall v. Southern Farm Bureau Cas. Co., 5 Cir., 353 F. 2d 737 (1966).

[4]See cases cited in footnote 2.

[5]See cases cited in footnote 1.

[6]"The dismissal of an action with prejudice or the entry of a judgment by default are drastic remedies, and should be applied only in extreme circumstances..." Independent Productions Corp. v. Loew's Inc., 2 Cir., 283 F. 2d 730, 733 (1960).

"...The sanction of dismissal is the most severe sanction that a court may apply, and its use must be tempered by a careful exercise of judicial discretion..." Durgin v. Graham, 5 Cir., 372 F. 2d 130, 131 (1967).

tions.[7] These rules are applicable to admiralty proceedings.[8]

This Court, while recognizing and enforcing the exercise of the power of final disposition of litigation as a sanction in some cases,[9] has adopted the view that such action is too harsh except in extreme circumstances. It has generally followed the more modern tenor appearing in the following quotation from the opinion in the recent case of *Durham v. Florida East Coast Ry. Co.*, 385 F. 2d 366, where Judge Wisdom, after recognizing the inherent power now under discussion, said: " . . . The decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumaceous conduct by the plaintiff . . . " Other cases by this Court emphasizing the importance, except in the most flagrant circumstances, of resorting to sanctions that do not deprive a litigant of his day in court are *Woodham v. American Cystoscope Company of Pelham, N. Y.*, 335 F. 2d 551 (1964), and *Council of Federated Organizations v. Mize*, 339 F. 2d 898 (1964). We are fully aware of the impelling need for cooperation from parties and attorneys to keep litigation on congested dockets moving; but except in extreme circumstances, the court should first resort to the wide range of lesser sanctions which it may impose upon the litigant or the derelict attorney, or both. The inherent power of a court to manage

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[7]Woodham v. American Cystoscope Company of Pelham, N. Y., 5 Cir., 335 F. 2d 551, 556 (1964). See also: Annotation: *Dismissal of Action for Failure or Refusal of Plaintiff to Obey Court Order*, 4 A.L.R. 2d 348; Waterman, *An Appellate Judge's Approach when Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance with Pretrial Orders*. 29 F.R.D. 420 (1961); Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Col. L. Rev. 480 (1958); Comment, *Sanctions at Pre-Trial Stages*, 72 Yale L. Jour. 819 (1963); 3 Moore, Federal Practice, 2d ed. pp. 1129-1130.

[8]L. Skalney Basket Co. v. U. S. Rednik, 2 Cir., 312 F. 2d 177 (1963); Kelley v. United States, 1 Cir., 338 F. 2d 328 (1964). (These cases are cited because the judgment in this case was entered prior to 1966).

[9]Marshall v. Southern Farm Bureau Cas. Co., supra, note 3.

its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it.[10] The *Woodham* case, *supra*, at p. 557, says that "courts may resort to disciplinary action against the erring attorney," and quotes with approval the following from *Sanctions at Pre-Trial Stages*, 72 Yale L. Jour. 819, 830:

> " . . . In addition, alternative modes of discipline against the attorney might include: (1) a reprimand by the court, (2) a finding of contempt, or (3) a prohibition against practicing for a limited time before the court whose order was neglected or disregarded. It seems fairly clear that the judicious use of such measures would tend to promote attorney compliance in the first instance."

We are convinced that the able trial judge was more than patient under the circumstances, but we feel that

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[10]See also texts cited in footnote 7. The view taken by this Court that the trial court has the inherent power to impose reasonable sanctions upon an errant attorney, where appropriate, indicates approval of the observations of Chief Judge Biggs and Judge Goodrich in the following quotations from their respective dissenting opinions in Gamble v. Pope & Talbert, Inc., 3 Cir., 307 F. 2d 229 (1962):

Chief Judge Biggs:

"The power of a court to discipline members of its own bar can scarcely be doubted seriously. An attorney is under no obligation to seek admission to the bar of a United States district court. He is at liberty to abstain from membership in that or any other bar. But when he does apply and is admitted he secured certain privileges and also assumes definite obligations.

"The power of a court to impose appropriate and reasonable sanctions upon those admitted to its bar is a familiar phenomenon and lies within the inherent power of any court of record. . ." 307 F. 2d, at 735.

Judge Goodrich:

"Now the judge may also discipline the members of the bar of his court and, in cases calling for it, may suspend them or punish them for contempt. It seems to me clear that with all this authority which the judge undoubtedly has that he can also impose sanctions for the disciplining of lawyers who, in matters not amounting to contempt, do not obey rules. If a judge is going to organize, either alone or with fellow judges, the business of the court, there must be authority to impose reasonable sanctions for the breach of reasonable rules." 307 F. 2d, at p. 737.

he erred in imposing the drastic sanctions upon the innocent litigant resulting in termination of the litigation adversely to him. Since this was apparently a single claim limitation proceeding, striking the appellant's claim and answer left the petition for limitation undenied which in turn results in the Court in effect granting exoneration and denying privity, either or both of which are frequently formidable issues for the shipowner. This proceeding was filed only a short time after the occurrence of the flash fire that gave rise to it, and it was less than a year old at the time it was dismissed. There was no indication that the appellant's claim was vexatious or fictitious. The admitted delay was not so long drawn out as to indicate a desire not to prosecute. The appellant was in no way connected with or responsible for, his proctor's dilatory conduct. While we do not condone that conduct, we feel that the circumstances of the case are not such that the appellant should lose his day in court,[11]

The judgment is reversed with directions to re-instate the case to its status as of the time the final decree was entered. It will be within the trial court's discretion to impose reasonable sanctions upon the appellant or his proctor, or both, short of final disposition of the case without an opportunity to be heard. In arriving at his decision, the trial judge may take into account the full record of conduct in this case from the beginning. *Diapulse Corp. of America v. Curtis Pub. Co.*, 2 Cir., 374 F.2d 442, 447 (1967).

REVERSED.

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[11]We do not intend to leave the impression that no sanctions may be imposed upon an innocent litigant for derelict conduct of his counsel. Link v. Wabash R. Co., supra note 1, expressly recognizes that a litigant can be held responsible for such conduct. The Federal Rules of Civil

APPENDIX B

[NUMBER AND TITLE OMITTED]

(Filed November 18, 1964)

This cause was instituted on the filing of a Petition for Exoneration from or limitation of liability by the above-named Petitioner, on February 5, 1964, praying for exemption from or limitation of liability for certain loss, damage, destruction and injury growing out of a fire or explosion on board its non-descript, self-propelled vessel known as "DUCKY", which occurred on or about the 24th day of September, 1963, while afloat and docked on Little River, adjacent to premises commonly known as 750 N.E. 79th Street, Miami, Dade County, Florida. Monition was duly issued dated February 6, 1964. Claimant, Albert Flaksa, filed answer to the petition and claim for personal injuries dated February 28, 1964. By order dated April 20, 1964, the defaults of other than Albert Flaksa were noted.

In accordance with the rules and practice of this Court, order for pre-trial conference and notice of trial dated July 10, 1964, was entered and furnished proctors, which order among other things provided for pre-trial conference on October 19, 1964, and for trial on November 23, 1964.

Procedure contemplate it. We are saying that where the facts are not such as to indicate that the litigant is a participant in the fault, sanctions finally depriving him of his day in court should be the last resort. This Court, in the *Woodham* case, supra, 335 F. 2d, at p. 557, suggests a conditional order of dismissal or disciplinary action against the erring attorney as some of the available effective lesser sanctions in proper cases.

Petitioner thereafter propounded interrogatories and filed motions for production and for compulsory physical examination within the times permitted by such order. These interrogatories, after prompting by Petitioner's proctors, were belatedly answered August 19, 1964. The motions to produce were granted by order dated and filed September 11, 1964, requiring production within ten days from the date thereof. These matters were material to the content of a pre-trial stipulation required by such pre-trial order, to which proctor for Petitioner had drawn attention in seeking compliance therewith on the part of Claimant.

On the morning of October 12, 1964, proctor for Claimant requested proctor for Petitioner to indicate agreement to a proposed continuance on the part of Claimant of the pre-trial conference as Claimant's case was not prepared, Claimant's proctor was not prepared to pre-try the case, and Claimant desired a continuance to re-open the Claimant's discovery. Proctor for Petitioner advised he was willing to meet with proctor for Claimant that day or any time proctor for Claimant was willing to meet. Proctor for Claimant at 3:45 P.M., October 12, 1964, served a motion to produce and a petition to continue pre-trial on proctor for Petitioner, noticing same for the time and date of pre-trial conference. On October 14, 1964, proctor for Petitioner received under cover of Claimant's proctor's letter dated October 13, 1964, copy of those matters required to be produced excepting a bill from one doctor. Claimant's petition to continue pre-trial recites in material part that "Proctors for Claimant have been unable to complete necessary discovery in order to simplify the issues in this matter." The file in this cause reflects no discovery pro-

cedures instituted by Claimant during the pendency of this cause except the motion to produce served October 12, 1964, which was not timely and was contrary to the terms of the pre-trial order dated July 10, 1964. The petition to continue pre-trial and motion to produce were denied in the presence of proctors on October 19, 1964.

Upon further review of the file, the Court caused proctors for the parties to be advised by telephone communication to their offices to appear before the Court on October 30, 1964. The proctor for Petitioner who had actively engaged in the case on behalf of Petitioner appeared; the proctor for Claimant who had actively engaged in the case on behalf of Claimant did not appear, the Court being advised he had proceeded to a State Bar meeting although knowledgeable of the circumstances, including the telephonic advices to his office. Another attorney appeared in his stead. A transcript of the conference before the Court on October 30, 1964, is a part of the record and file of this cause.

The Court finds from the file and record in this case, including the pleadings of the Claimant, that Claimant and his proctors have failed to prosecute his claim with reasonable diligence; and that Claimant and his proctors have failed to abide by the orders and rules of this Court regulating pre-trial procedure applicable to this case in numerous respects.

It is, therefore, hereby

ORDERED, ADJUDGED, AND DECREED:

1. That the claim of the Claimant, Albert Flaksa, be and the same is hereby dismissed with prejudice, and his answer to the Petition herein be and the same is hereby stricken.

2. That the fire or explosion described in the Petition was not caused by the design or neglect of the Petitioner, Little River Marine Construction Co., Inc., and did not occur with the privity or knowledge of said Petitioner.

3. That the said Petitioner be, and it hereby is, forever exempted and discharged from all loss, damage, destruction or injury arising from or growing out of the said fire or explosion.

DATED at Miami, Florida, the 18th day of November, 1964.

S/ Charles B. Fulton
UNITED STATES DISTRICT JUDGE